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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LEXINGTON INSURANCE COMPANY, Plaintiff and Appellant, v. KELLER & GANNON, Defendant and Respondent.	A100050 (S.F. City & County Super. Ct. No. 304188)

I. INTRODUCTION

Lexington Insurance Company (Lexington) appeals from the trial court's order granting summary judgment in favor of Keller & Gannon (K&G). Lexington and its insured, Meissner + Wurst U.S. Operations, Inc. (M+W), sued K&G for indemnity, seeking to recoup funds Lexington paid in the defense and settlement of claims by a third party against M+W. Lexington contends that the trial court erred in finding that an agreement between M+W and K&G provided that K&G had no liability for indemnification of M+W for the professional services it had rendered to M+W and in ruling that the agreement was enforceable under Texas's law.

We conclude that the agreement is ambiguous regarding M+W's right to indemnification and, therefore, that parole evidence on the parties' intent on that subject was admissible. As a consequence, we reverse.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1995, Hyundai Electronics America, Inc. (Hyundai) entered into a professional services agreement with M+W stating that M+W would provide engineering and other

design services in connection with a semiconductor manufacturing facility (the project) located in Eugene, Oregon. M+W also entered into a separate construction contract with Hyundai. The project was constructed between 1995 and 1997.

On May 1, 1995, M+W and K&G entered into a master agreement for services and approximately 48 individual project agreements (the agreement) in connection with the project. K&G agreed to act as M+W's sub-consultant and to provide design-related services with respect to the project. It is undisputed that during contract negotiations, M+W knew that K&G carried multi-million dollar professional negligence liability insurance.

The master agreement for services provided that Texas law was to govern the agreement. It also stated that it anticipated the execution of individual project agreements and each executed individual project agreement (IPA) was "incorporated in full into this Agreement by reference and shall be subject to the terms and conditions of this Agreement." The agreement stated that K&G "shall furnish all necessary labor, materials, tools, equipment, supervision and insurance to perform the Services described in the IPA and in this Agreement." Section 5 of the agreement specified that K&G "will perform all work under this Agreement in accordance with the standards and practices of care, skill and diligence customarily observed by similar firms under similar circumstances at the time K&G's Services are rendered."

Of particular importance to the issues raised on this appeal is section 30, entitled "Indemnity." It specified the following: "Notwithstanding any other provision of this Agreement, K&G agrees to indemnify, defend and hold harmless M+W, its subcontractors, consultants, agents, officers, directors, and employees from and against any and all claims, damages, losses and reasonable expenses, whether direct, indirect or consequential, including but not limited to liabilities, obligations, claims, costs, reasonable expenses (including without limitation interest, penalties and reasonable attorney's fees), fines, taxes, levies, imposts, assessment, demands, damages, or judgments or any kind or nature (including without limitation administrative and judicial orders and consents, stipulations and other forms of resolution of administrative or

judicial action) to the extent arising directly or indirectly out of or resulting from K&G's performance of Services, or work and materials supplied by K&G, pursuant to the term of this Agreement. K&G's aggregate liability under this Agreement will be limited to the proceeds of the insurance coverage specified in Section 15."

Section 15 of the agreement, entitled "Insurance," required K&G to maintain "the following minimum levels of insurance, covering activities and obligations undertaken by K&G pursuant to this Agreement: [¶] i) Worker's Compensation and Employer's Liability Insurance . . . $100,000 each accident[.] [¶] ii) General Liability, Comprehensive Form . . . $1,000,000 per occurrence; $1,000,000 aggregate[.] [¶] iii) Automobile Liability, Comprehensive Form . . . . $1,000,000 each accident." (Underline omitted.) Under the general liability heading, was the following provision: "Contractual (See Section 29 below, regarding 'Indemnity')."

Section 15 further provided: "All such insurance shall provide coverage on the basis of occurrences during the policy period, and not on the basis of claims made during the policy period. K&G shall procure additional amounts or categories of insurance coverage, if required by law. Unless waived by M+W as provided below, M+W shall be named as an additional insured on all policies, except workers' compensation, for all work done by K&G for M+W. Prior to commencing work, K&G shall provide executed certificates of insurance to M+W evidencing the coverage described above. K&G shall promptly notify M+W of any modification, cancellation, lapse, or termination in such insurance which may affect M+W."

In April 1998, Hyundai alleged improper performance of services with respect to the project against M+W and its sub-consultants. Since M+W believed that Hyundai's claims related in substantial part to the work performed by K&G, it tendered its defense of the Hyundai claims to K&G. K&G refused the tender.

M+W was insured under a professional insurance policy issued by Lexington with limits of five million dollars. On December 16, 1999, M+W entered into a settlement and release with Hyundai. M+W agreed to pay Hyundai $3.5 million of M+W's professional liability policy through Lexington in exchange for a full release from Hyundai. On

March 8, 2000, Lexington paid $3.5 million to Hyundai as part of the full settlement of the claims asserted by Hyundai against M+W.

On June 14, 1999, M+W filed a complaint against K&G for breach of contract, negligence, professional negligence, contractual indemnity, common law indemnity, and contribution. On April 23, 2001, the parties stipulated to the joinder of Lexington as a plaintiff and to the filing of an amended complaint. Thereafter, Lexington and M+W filed a first amended complaint, which alleged essentially the same claims contained in the original complaint.

K&G moved for summary judgment. After the initial hearing, the court ordered further briefing. Lexington and M+W filed a motion for summary adjudication. On March 15, 2002, the court held another hearing on the summary judgment and summary adjudication motions. On July 24, 2002, the court granted K&G's motion for summary judgment and denied the motion for summary adjudication by Lexington and M+W. The court explained: "Plaintiffs' claims are barred by the contract's Section 30 limitation of liability to insurance proceeds, and since no professional liability insurance coverage was required under Section 15 of the contract, Defendant's liability for professional negligence is zero. Plaintiffs failed to raise a triable issue of material fact regarding the existence of a disadvantage in bargaining power between the parties, so the contractual limitation of liability is not, on this basis, against public policy. . . . Further, the Texas 'fair notice' doctrine does not apply because Section 30 is a limitation of liability, not a Release. . . ."

Both M+W and Lexington filed timely notices of appeal, and we consolidated the appeals. Subsequently, the parties stipulated to removing M+W as a plaintiff because it had acquired K&G. Thus, the only party appealing the lower court's decision is Lexington.

III. DISCUSSION

A. *Standard of Review*

The court properly grants summary judgment if the record establishes no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of

law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has met the burden of showing a cause of action has no merit if the party establishes that one or more elements of the cause of action cannot be established (Code Civ. Proc., § 437c, subd. (o)(1)) or that an affirmative defense exists as to that cause of action (Code Civ. Proc., § 437c, subd. (o)(2)). Once the defendant meets this burden, the plaintiff must show a triable issue of fact exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (p).) We review the record de novo. (*Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548, disapproved on other grounds in *Camargo v. Tjaarda* (2001) 25 Cal.4th 1235, 1245.)

B. *The Contract is Ambiguous Regarding K&G's Obligation to Indemnify M+W.*

As stated *ante,* section 30 of the agreement between K&G and M+W provided, in relevant part: "Notwithstanding any other provision of this Agreement, K&G agrees to indemnify, defend and hold harmless M+W . . . from and against any and all claims, damages, losses and reasonable expenses . . . to the extent arising directly or indirectly out of or resulting from K&G's performance of Services, or work and materials supplied by K&G, pursuant to the term of this Agreement. K&G's aggregate liability under this Agreement will be limited to the proceeds of the insurance coverage specified in Section 15."

Section 15 required K&G to maintain worker's compensation and employer's liability insurance; general liability, comprehensive insurance; and automobile liability, comprehensive insurance. Section 15 did not specifically mention professional negligence insurance. However, under the "General Liability" heading there is a clause which reads: "Contractual (See Section 29 below, regarding 'Indemnity')." The section of the contract which actually covers "Indemnity" is, as just noted, section 30. Clearly, by specifying the relevant subject as "Indemnity," this clause makes clear that its reference to "Section 29" was a typographical error and the parties intended to cross-reference section 30.

The trial court found that section 30 in the contract was not ambiguous and, reading section 30 together with section 15, the contract did not require K&G to

indemnity M+W for professional negligence. On appeal, Lexington asserts that section 30 is ambiguous and, therefore, the trial court should have considered parole evidence of the parties' intent.[1]

K&G maintains, first of all, that Lexington has waived raising this issue on appeal because it argued in the trial court that the agreement was not ambiguous. Lexington did argue below that section 30 in the agreement was an indemnity provision, not a release provision, and it therefore only limited K&G's "responsibility to indemnify M+W for the types of losses for which insurance was provided in section 15." Alternatively, however, Lexington also argued in the lower court that section 30 was ambiguous. It has, therefore, preserved this issue for appeal.

The agreement contained a Texas choice of law provision. Under Texas law, "[w]hether a contract is ambiguous is a question of law which the court determines by examining the contract as a whole, in light of the circumstances present when the parties entered into the contract. [Citations.]" (*Grimes v. Andrews* (Tex.App. 1999) 997 S.W.2d 877, 881 (*Grimes*).) "A contract is not ambiguous when it is so worded that it can be given a certain or definite legal meaning or interpretation. [Citations.] A contract is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. [Citations.] An ambiguity does not arise merely because the parties advance conflicting interpretations. [Citations.] Only when a contract is susceptible to two or more reasonable interpretations, after applying the applicable rules of contract construction, will a court hold that the contract is ambiguous. [Citations.] If a contract is ambiguous, then a fact issue exists on the parties' intent and summary judgment is not proper. [Citations.]" (*Id.* at p. 882.) However, "[p]arol evidence is not admissible for the purpose of creating an ambiguity." (*National Union Fire Insurance Co. v. CBI Industries* (Tex. 1995) 907 S.W.2d 517, 520.) "Only where a contract is first determined to be ambiguous may the courts consider the parties' interpretation, [citation],

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[1] In the superior court, Lexington submitted evidence that the parties intended to have K&G indemnify M+W for any negligent performance of its design services.

and admit extraneous evidence to determine the true meaning of the instrument. [Citation.]" (*Ibid.*)

"When examining a contract, [a court applying Texas law] must attempt to give effect to all contract provisions so that none will be rendered meaningless. [Citation.] No single provision will be controlling, rather all provisions will be considered with reference to the entire contract. [Citation.] [The court] presume[s] that parties to a contract intend every clause to have some effect. [Citation.] [The court] gives terms their plain, ordinary, and generally accepted meaning unless the contract shows that the parties used them in a technical or different sense. [Citation.]" (*Grimes, supra,* 997 S.W.2d at p. 882.)

Particularly important for purposes of the present appeal is the emphasis Texas appellate decisions have placed on the *context* of the dispute as to whether a contract is or is not ambiguous. Thus, the Texas Supreme Court has expressly held that "[A] court should construe a contract from a utilitarian standpoint, *bearing in mind the particular business activity sought to be served. Thus, a court need not embrace strained rules of construction that would avoid ambiguity at all costs.*" (*Lenape Resources Corp. v. Tennessee Gas Pipeline Co.* (Tex. 1996) 925 S.W.2d 565, 574; emphasis added; (*Lenape*).) This holding, and indeed almost exactly this language, are familiar in Texas parole evidence jurisprudence. To precisely the same effect are: *Reilly v. Rangers Management, Inc.* (Tex. 1987) 727 S.W.2d 527, 530; *Neece v. A.A.A. Realty Co., Inc.* (Tex. 1959) 322 S.W.2d 597, 602; and *Colorado Interstate Gas Co. v. Hunt Energy Corp.* (Tex.Civ.App. 2000) 47 S.W.3d 1, 7.

Lexington construes section 30 as obligating K&G to indemnify M+W, without any limit, for liabilities arising out of the rendition of professional services. The agreement, it notes, was for K&G to provide professional design services, and the first sentence of section 30 expressly states the K&G will indemnify M+W for any and all losses stemming from K&G's performance of such services. To limit K&G's liability to worker's compensation, employer's liability, general liability and automobile coverage, Lexington asserts, would contradict the stated purpose of section 30. In this connection,

Lexington cites, among other provisions, section 5 of the contract, which provides: "K&G covenants and warrants that K&G will perform all work under this Agreement in accordance with the standards and practices of care, skill and diligence customarily observed by similar firms under similar circumstances at the time K&G's Services are rendered. K&G warrants that all Services performed hereunder shall be free of defects in workmanship. In addition to any other applicable or appropriate standards, K&G shall utilize and comply with the relevant portions of any regulatory standards specifically referred to in the IPA or otherwise applicable to the Services. Notwithstanding M+W's acceptance of K&G's work pursuant to Section 6, if the Services provided hereunder do not meet the warranties specified herein or otherwise applicable, M+W may require K&G to correct at no cost to M+W any defective or nonconforming item. M+W may correct the defective or nonconforming items itself, should K&G's remedy be non-acceptable to M+W, and charge K&G with the cost of such correction. The foregoing remedies are in addition to all other remedies at law or in equity or under this Agreement and shall not be deemed to be exclusive. K&G shall promptly repair or replace at its own expense all damage, scars or disfigurements to any materials or property that is part of, or contained in, M+W's work site that are the result of the methods or materials used or employed by K&G, its personnel or its other agents."

We are of the opinion that the contract before us, particularly sections 5, 15 and 30, is ambiguous regarding K&G's obligation to indemnify M+W for its professional negligence and that, therefore, parole evidence on that issue should have been admitted and considered by the trial court. A significant part of the basis for this conclusion is the "particular business activity sought to be served" by the agreement in question. (*Lenape, supra,* 925 S.W.2d at p. 574.) Indemnity provisions in construction agreements whereby a subcontractor, engineer or architect agrees to indemnify and hold harmless a general contractor from the former's professional negligence are as common as can be imagined. One standard text on construction law makes this point in several contexts: "Indemnification is another contractual approach to shifting risk that is intended to counteract the results of the operation of law. Indemnification clauses are used to require

one party to assume the liability, loss, or damage that another has suffered. . . . [¶] Indemnification clauses are frequently encountered by architects and engineers in owner-drafted design services agreements. Such clauses frequently require indemnity for any loss or damage arising out of the design professional's services, without regard to negligence, or to the extent that the owner or others may be responsible." (1 Stein, Construction Law (2003) § 3.03[2][a], p. 3-91; see also *id*. at § 3.03[4][c], p. 3-141.)

Not surprisingly, this is also the practice in California: "Express indemnity clauses are customarily included in prime contracts, subcontracts, purchase orders, and contracts for architectural and engineering services as a means of shifting risks on construction projects." (2 Cal. Construction Contracts and Disputes (Cont.Ed.Bar 3d ed. 2002) § 9.53, p. 698.) Indeed, there are reported cases in both Texas and California reciting the use of indemnity clauses covering professional negligence in construction contracts and subcontracts (See, e.g., *Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.* (Tex.Civ.App. 1995) 902 S.W.2d 536, 538; *Derr Construction Co. v. City of Houston* (Tex.Civ.App. 1992) 846 S.W.2d 854, 857-858; *Heppler v. J. M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1272-1273.)

It also appears to be common in the construction industry for a contractor not only to agree to indemnify the owner (or a subcontractor the general contractor) for damage caused by negligence, including professional negligence, but also to require the potential indemnitor to agree to secure and keep in place insurance in favor of the potential indemnitee to assure the payment of indemnity claims. Thus, the same text quoted above notes later: "The risks incident to a construction project are of such potential magnitude that if those risks mature into claims for money damages, both owners and contractors could be forced into bankruptcy or, at the very least, the outstanding claims could indefinitely postpone the completion of a project. Thus, an obligation to procure insurance is an essential element of managing the risks inherent in a construction project and is written into most construction contracts." (4 Stein, Construction Law, *supra,* § 13.16[1], p. 13-106.) To the same effect is another treatise: "It is common in construction projects for the general contractor to shift to a subcontractor responsibility

for claims connected to that subcontractor's work. This allocated risk becomes the subject of insurance, which the subcontractor is generally required to carry under the subcontract. At bottom, the purpose of the indemnity clause is to distribute among the subcontractors and suppliers, insurance burdens covering their respective areas of responsibility." (Federico, Construction Law (Defense Research Inst. 1999) Additional Insured and Indemnitee Status, § I.)

These authorities make clear that in "the particular business activity sought to be served" (*Lenape, supra,* 925 S.W.2d at p. 574) it is common to require subcontractor entities such as K&G to *both* indemnify the entity "upstream" from it—in this case M+W—for any damage the latter may suffer from conduct, including professional negligence, of the subcontractor *and* provide insurance to accomplish that goal. That fact, plus (1) the apparent intent in both paragraph 5 and the first sentence of paragraph 30 to provide for indemnity by K&G for professional negligence and (2) the (admittedly imperfect) cross-reference in paragraph 15 to the "Indemnity" provision, compel the conclusion that the contract was ambiguous regarding K&G's indemnity obligations. As a consequence, parole evidence on that subject should have been admitted and considered.[2]

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[2] The second issue raised by Lexington was whether the agreement, assuming it did not require indemnification, was valid under the "fair notice" requirement of Texas law. (See, e.g., *Dresser Industries, Inc. v. Page Petroleum, Inc.* (Tex. 1993) 853 S.W.2d 505, 508.) The determination of this issue depends on whether, after parole evidence is admitted and considered, the agreement is or is not found to require indemnification of Lexington by K&G. Thus, we need not address that issue now.

IV. DISPOSITION

The judgment is reversed and the matter remanded to the superior court for further proceedings not inconsistent with this opinion. Costs on appeal are awarded to Lexington.

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Haerle, J.

I concur:

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Kline, P.J.

Dissenting opinion of Lambden, J.

I respectfully dissent. The majority's effort to conjure ambiguity is based upon evidence of the so-called "context" of the contractual dispute. This amounts to the premature consideration of parole evidence of the parties' intent.[1] It is fundamental, even in Texas, where these parties have chosen to find their law, that "[p]arole evidence is not admissible for the purpose of creating an ambiguity." (*Nat. Union Fire Ins. v. CBI Industries* (Tex. 1995) 907 S.W.2d 517, 520.) "Only where a contract is *first determined to be ambiguous* may the courts consider the parties' interpretation, [citation], and admit extraneous evidence to determine the true meaning of the instrument. [Citation.]" (*Ibid.,* italics added). This threshold legal principle is essentially ignored by the majority opinion, which emphasizes the " 'particular business activity sought to be served' " (maj. opn. at p. 8) by the contract and relies upon generalizations concerning the "customary" provisions in professional service contracts. Both "context' and "custom" are merely euphemisms for parole evidence of intent, which should not be considered by this court until ambiguity has first been found on the face of the contract.

There is little weight of authority in statements from treatises to the effect that " . . . Indemnification clauses are frequently encountered by architects and engineers in owner-drafted design services agreements" (maj. opn. at pp. 8-9; citing 1 Stein Construction Law (2003) § 3.03 [2][a], p. 3-91 and § 3.03 [4][c], p. 3-141); and such extraneous matters should not be considered until an ambiguity has been shown. Here the majority's conclusion is supported by nothing more tangible than an asserted typographical error, which finds no support in the record.[2] Even if it is true, as the

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[1] Lexington submitted evidence that the parties intended to have K&G indemnify M+W for its negligent performance of design services.

[2] Neither party mentioned this reference to "contractual" liability, nor did they mention that the reference to section 29 as "Indemnity" was clearly incorrect, since section 29 refers to "Termination" and section 30 refers to "Indemnity." When questioned at oral argument about this provision, counsel stated that there was nothing in the record to explain this reference. Other than agreeing that this provision was another

majority speculates, that the "general liability" heading of section 15 of the contract should have referred to the following clause as section 30 rather than section 29, this slip of the pen cannot be read to create any ambiguity of discernable consequence. The majority opinion does not explain how changing the reference of "Contractual" to section 30 would create any reasonable inference that professional liability insurance was required by the contract. Even assuming the correction of this supposed typographical error, the meaning of the words otherwise employed in the contract is obvious.

The majority manufactures ambiguity 1) by using parole evidence to establish intent and custom rather than focusing, as it must do under Texas law, on the express language of the clauses; 2) by concocting evidence not in the record to determine the meaning of a typographical error, which was neither argued nor asserted by the parties; and 3) by interpreting a provision as being contradictory simply because the first sentence is broadly stated and is followed by a second sentence that provides limits and exceptions. Nevertheless, the express terms of section 30 remain clear.

Section 30, entitled "Indemnity," provided for indemnification as follows: "Notwithstanding any other provision of this Agreement, K&G agrees to indemnify, defend and hold harmless M+W, its subcontractors, consultants, agents, officers, directors, and employees from and against any and all claims, damages, losses and reasonable expenses, whether direct, indirect or consequential, including but not limited to liabilities, obligations, claims, costs, reasonable expenses . . . arising directly or indirectly out of or resulting from K&G's performance of Services, or work and materials supplied by K&G, pursuant to the term of this Agreement. *K&G's aggregate liability under this Agreement will be limited to the proceeds of the insurance coverage specified in Section 15."* (Italics added.)

Section 30 thus limits all liability. The section does not state that liability for ordinary negligence, but not for professional design negligence, is limited to the proceeds

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example of poor drafting, neither of the attorneys for either party argued that this provision was relevant to the issues raised on appeal. I submit that no inference can be drawn from this provision as a matter of law, since the record is silent on this subject.

of the insurance coverage specified in section 15. Rather, section 30 limits K&G's "aggregate liability under this Agreement" to the "proceeds of the insurance coverage specified in Section 15." Lexington initially argued in the lower court that section 30 in the agreement is actually an affirmative indemnity provision, not a release provision, and that it therefore only limited K&G's "responsibility to indemnify M+W for the types of losses for which insurance was provided in Section 15." Lexington argued only alternatively that section 30 is ambiguous; and this alternative argument was that the language of the contract was not what the parties intended.

The problem for Lexington, of course was that section 15 of the agreement, entitled "Insurance," plainly required K&G only to maintain "the following minimum levels of insurance, covering activities and obligations undertaken by K&G pursuant to this Agreement: [¶] i) Worker's Compensation and Employer's Liability Insurance . . . $100,000 each accident[.] [¶] ii) General Liability, Comprehensive Form . . . $1,000,000 per occurrence; $1,000,000 aggregate[.] [¶] iii) Automobile Liability, Comprehensive Form . . . . $1,000,000 each accident." (Underline omitted.) Under the "general liability" heading, was the following provision: "Contractual (See Section 29 below, regarding 'Indemnity')."

Section 15 thus provides an unambiguous list of the required insurance coverage; and it does not mention professional liability insurance. If the typographical error were to be corrected as proposed by the majority, the effect would be to refer back to section 30, which would lead to the same limiting language: "K&G's aggregate liability under this Agreement will be limited to the proceeds of the insurance coverage specified in Section 15." The mislabeling of the section cannot change the fact that "*aggregate liability under this Agreement"* is expressly limited to the proceeds of the insurance coverage specified in section 15; and section 15 does not include professional liability insurance.

The majority opinion also concludes that the contract is ambiguous by considering what it characterizes as the customary practice in "the particular business activity sought to be served." (Maj. opn. at p. 8.) Like parole evidence of the parties' intent, such

evidence of custom is extraneous to the legal determination of ambiguity. (*Nat. Union Fire Ins. v. CBI Industries, supra,* 907 S.W.2d at p. 520.) However, aside from the majority opinion's citation to treatises suggesting that "Indemnification clauses are frequently encountered" and represent ". . . another contractual approach to shifting risk that is intended to counteract the operation of law" (1 Stein Construction Law, *supra,* § 3 3.03 [2][a], p. 3-91 and § 3.03 [4][c], p. 3-141), there is no citation of authority to support the circular conclusion that extraneous evidence can be used to establish ambiguity. This dubious proposition supports the majority's conclusion only because the contract does not conform to the extraneous evidence of custom and practice offered by Lexington. Presumably, the majority does not intend to suggest that indemnification in professional service contracts is inferable as a matter of law; but that is precisely the result of its holding.

Under Texas law, "A contract is not ambiguous when it is so worded that it can be given a certain or definite legal meaning or interpretation. [Citations.] A contract is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. [Citations.] An ambiguity does not arise merely because the parties advance conflicting interpretations. [Citations.] Only when a contract is susceptible to two or more reasonable interpretations, after applying the applicable rules of contract construction, will a court hold that the contract is ambiguous. [Citations.] If a contract is ambiguous, then a fact issue exists on the parties' intent and summary judgment is not proper. [Citations.]" (*Grimes v. Andrews* (Tex.App. 1999) 997 S.W.2d 877, 881-882 (*Grimes*).) Read together, even in light of poor draftsmanship, sections 30 and 15 do not suggest two reasonable interpretations. Section 30 says that liability shall be limited as provided by section 15; and section 15 does not mention professional liability.

No part of either section should be interpreted so as to negate another part of the contract. "When examining a contract, [a court applying Texas law] must attempt to give effect to all contract provisions so that none will be rendered meaningless. [Citation.] No single provision will be controlling, rather all provisions will be considered with

reference to the entire contract. [Citation.] [The court] presume[s] that parties to a contract intend every clause to have some effect. [Citation.] [The court] gives terms their plain, ordinary, and generally accepted meaning unless the contract shows that the parties used them in a technical or different sense. [Citation.]" (*Grimes, supra,* 997 S.W.2d at p. 882.) Section 30 provides for indemnification but states that section 15 shall define limits of the extent of liability; and section 15 contains no provision for the relief sought by appellant. The majority's conclusion attempts to infer broader indemnification by regarding only the first part of section 30 as important and therefore controlling. Such an interpretation renders the express terms of both sections meaningless in large part.

The majority opinion's interpretation would thus construe section 30 to obligate K&G to indemnify M+W *without any limit* for liabilities arising out of the rendition of professional services, since professional liability insurance is not mentioned in the limitations of section 15. Moreover, according to the majority, section 30 must limit K&G's duty to indemnify M+W for losses stemming from ordinary negligence, but not from professional design negligence. Both of these anomalous results must be part of the alternative reasonable interpretation that the majority apparently believes can be inferred from the language of the contract.

Admittedly, section 15 probably specifies the wrong reference under the general liability heading: "Contractual (See Section 29 below, regarding 'Indemnity')." However, this does not mean that the limitation provided by section 30's reference to section 15 must be discarded. There are obviously other bases for "contractual" liability under the agreement, including liabilities arising under the other, related contracts specifically contemplated by the agreement. Although the typographical error might create some ambiguity in the interpretation of section 15 as to those other contracts, it does not create any ambiguity in the interpretation of section 30. The first sentence in section 30 clearly provides that K&G will indemnify Lexington; and the second sentence limits that liability to the "proceeds of the insurance coverage specified in Section 15."

The majority opinion suggests that these two parts of section 30 contradict each other and contradict other provisions of the agreement, thus creating an ambiguity

requiring parole evidence to be considered. Since the agreement was for K&G to provide professional design services, and because the first sentence of section 30 expressly states that K&G will indemnify M+W for any and all losses stemming from K&G's performance of its "Services" the majority opinion concludes that limiting K&G's liability to worker's compensation and employer's liability coverage, general liability coverage, and automobile coverage, would contradict the stated purpose of section 30. This interpretation makes it impossible to use the technique of broadly stating a contract term and following it with specific exceptions and limitations.

When section 30 is read as a whole, the two sentences are not inconsistent; and it is unnecessary and undesirable to contort them to conform to whatever parole evidence may indicate the parties may have mistakenly thought they expressed or to whatever may be common in these types of contracts.[3] The first sentence provides that K&G agrees to indemnify M+W "to the extent arising directly or indirectly out of or resulting from K&G's performance of Services, or work and materials supplied by K&G . . . ." The second sentence specifies that "K&G's aggregate liability under this Agreement will be limited to the proceeds of the insurance coverage specified in Section 15." Since section 15 does not specify professional negligence insurance, it exempts K&G from any liability for a claim by a third party against M+W, which arises from the negligent performance of K&G's services. The provision, however, does not exculpate K&G from all liability from the negligent performance of its *own* services, since it does nothing to limit its direct liability to M+W. Any fear that the majority might have that K&G could escape from compensating M+W for the negligent performance of its own services is thus unfounded.

In addition to concluding that sections 15 and 30 are internally inconsistent, the majority also relies on section 5 to find ambiguity. Section 5 provides: "K&G covenants and warrants that K&G will perform all work under this Agreement in accordance with

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[3] It appears that mutual mistake might explain the failure to mention professional negligence insurance in section 15. I express no opinion as to whether such a defense would be successful or desirable to the parties under Texas law. (See *Escamilla v. Estate*

the standards and practices of care, skill and diligence customarily observed by similar firms under similar circumstances at the time K&G's Services are rendered. K&G warrants that all Services performed hereunder shall be free of defects in workmanship. In addition to any other applicable or appropriate standards, K&G shall utilize and comply with the relevant portions of any regulatory standards specifically referred to in the IPA or otherwise applicable to the Services. Notwithstanding M+W's acceptance of K&G's work pursuant to Section 6, if the Services provided hereunder do not meet the warranties specified herein or otherwise applicable, M+W may require K&G to correct at no cost to M+W any defective or nonconforming item. M+W may correct the defective or nonconforming item itself, should K&G's remedy be non-acceptable to M+W, and charge K&G with the cost of such correction. The foregoing remedies are in addition to all other remedies at law or in equity or under this Agreement and shall not be deemed to be exclusive. K&G shall promptly repair or replace at its own expense all damages, scars or disfigurements to any materials or property that is part of, or contained in, M+W's work site that are the result of the methods or materials used or employed by K&G, its personnel or its other agents."

The majority appears to have concluded that, because professional liability insurance was contemplated by the contract[4] and because section 5 requires K&G to perform its services in accordance with the customary standards of care, the trial court's interpretation that K&G is not required to indemnify M+W for negligent professional services contradicts sections 1 and 5. Sections 1 and 5, however, do not contain any contradiction: they merely require K&G to perform its services in accordance with the

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of Escamilla (1996) 921 S.W.2d 723, 725; *Olson v. Bayland Pub., Inc.* (1989) 781 S.W.2d 659, 663.)

[4] Section 1 specifies: "This agreement anticipates the execution of an Individual Project Agreement (IPA) and sets forth the terms and conditions pursuant to which K&G will provides services ('Services') to M+W. Each executed IPA is hereby incorporated in full into this Agreement by reference and shall be subject to the terms and conditions of this Agreement. K&G shall furnish all necessary labor, materials, tools, equipment, supervision and insurance to perform the Services described in the IPA and in this Agreement."

customary standards of care. Neither provision contradicts the interpretation of section 30 that limits K&G's aggregate liability to the proceeds of insurance listed in section 15, which does not include professional liability insurance.

Accordingly, I would hold that section 30 expressly limits K&G's indemnification liability to "the proceeds of the insurance coverage specified in Section 15" and that since section 15 does not list professional liability insurance, K&G did not agree to indemnify M+W for professional negligence. Without the necessary threshold showing of ambiguity, parole or extrinsic evidence should not be considered (*Nat. Union Fire Ins. v. CBI Industries, supra,* 907 S.W.2d at p. 520); and the trial court did not err in failing to consider such evidence.[5]

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Lambden, J.

[5] I need not discuss the second issue raised by the appeal, to wit: whether the contract is therefore subject to Texas's fair notice requirement, which applies when an agreement exculpates a party from the consequences of its own negligence. (*Dresser Industries, Inc. v. Page Petroleum, Inc.* (Tex. 1993) 853 S.W.2d 505, 508.)